

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 07-N-10610-RAH
)	
DAVID ERIC BROCKWAY,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND ORDER OF
Member No. 75442,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

This matter was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar) alleging that respondent David Eric Brockway failed to comply with rule 955 of the California Rules of Court¹ as ordered by the Supreme Court. The State Bar was represented by Joy Chantarasompoth. Respondent did not participate either in person or by counsel.

For the reasons stated below, it is recommended that respondent be disbarred.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on March 22, 2007 and was properly served on respondent on March 21, 2007, by certified mail, return receipt requested, at the address shown on the official membership records of the State Bar (official address). (Bus. & Prof. Code §6002.1, subd. (c)²; Rules Proc. of State Bar, rules 60(b) and 583.) Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The return receipt shows that this correspondence was delivered on April 9, 2007 to “David

¹Future references to rule are to this source. Rule 955 was renumbered as rule 9.20 effective January 1, 2007.

²All references to section are to this source.

Brockway.”

On March 26, 2007, the State Bar Court properly served respondent by first-class mail, postage prepaid at his official address with a notice scheduling a status conference on May 3, 2007. The court judicially notices its records pursuant to Evidence Code section 452, subdivision (h) which indicate that this correspondence was not returned as undeliverable. Respondent did not appear at the status conference. On May 9, 2007, an order memorializing the status conference was properly served on him at his official address.

Respondent did not file a response to the NDC. On April 23, 2007, the State Bar filed and properly served on respondent a motion for entry of default by certified mail, return receipt requested, at his official address (Rules Proc. of State Bar, rule 200(a), (b).) The motion advised respondent that the State Bar would seek minimum discipline of disbarment if he was found culpable. (Rules Proc. of State Bar, rule 200(a)(3).)

Respondent did not respond to the default motion. Orders entering respondent's default and involuntarily enrolling him inactive were filed and properly served on him on May 9, 2007, by certified mail, return receipt requested at his official address. This document advised respondent, among other things, that he was enrolled inactive pursuant to section 6007, subdivision (e) effective three days after service of the order. The return receipt shows that this correspondence was delivered on May 23, 2007 to “David E. Brockway.”

The State Bar’s efforts to contact respondent were fruitless.

The case was submitted for decision on May 17, 2007, after the State Bar filed and properly served on respondent a closing brief.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (Section 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).) The findings are also based upon matters admitted into evidence or judicially noticed.

A. Jurisdiction

Respondent was admitted to the practice of law in California on October 4, 1977, and has

been a member of the State Bar at all times since.

B. Facts

On September 7, 2006, the California Supreme Court filed an order, number S144707, in State Bar Court case nos. 01-O-03470; 01-O-04083; 01-O-04120; and 02-O-12367 (Cons.)³ (September 7 order) in which respondent was ordered, among other things, to be actually suspended for two years and until he complied with Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,⁴ standard 1.4(c)(ii). He was also ordered to comply with rule 955(a) and (c) within 30 and 40 days, respectively, of the effective date of its order. The order was effective on October 7, 2006. (Rule 953(a).⁵) Accordingly, respondent was to comply with rule 955(c) no later than November 16, 2006.

The Supreme Court promptly sent respondent a copy of its order.⁶ A copy of it also was attached to the NDC in the instant proceeding.

As of March 20, 2007, respondent had not filed with the State Bar Court the affidavit required by rule 955(c). He still has not done so.⁷ He has offered no explanation for his noncompliance with rule 955(c).

C. Legal Conclusions

³These cases were addressed by the State Bar Court's Review Department in *In the Matter of Brockway* (Rev. Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944.)

⁴Future references to standard or std. are to this source.

⁵This rule was renumbered as rule 9.18 effective January 1, 2007.

⁶Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon respondent, rule 8.532(a) of the California Rules of Court (formerly numbered as rule 29.4(a)) requires the Clerk to promptly transmit a copy of all opinions and orders to the parties upon filing. Moreover, it is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, this court finds that the Clerk of the Supreme Court performed his duty and transmitted a copy of the Supreme Court's order to respondent promptly after its filing.

⁷Pursuant to Evidence Code section 452, subdivision (d), the court judicially notices that its records still do not contain a rule 955(c) affidavit from respondent.

There is clear and convincing evidence that respondent wilfully violated the September 7, 2007, order directing his compliance with rule 955.⁸ This constitutes a violation of rule 955(d), which makes the wilful noncompliance with the provisions of rule 955 a cause for disbarment, suspension or revocation of probation, in relevant part.

IV. FINDINGS AND CONCLUSIONS AS TO AGGRAVATING CIRCUMSTANCES

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Rule 216(a) of the Rules of Procedure provides, in pertinent part, that a prior record of discipline consists of an authenticated copy of all charges, stipulations, findings and decisions reflecting or recommending imposition of discipline. Rule 216 clearly anticipates that the State Bar will introduce certified copies of documents reflecting a respondent's prior record of discipline. Such practice makes the prior record of discipline a part of the official record of the State Bar Court proceeding and enhances the ability of the Supreme Court to conduct its independent, *de novo* review of the State Bar Court's decision and the record supporting that decision.

In this proceeding, the State Bar did not attach copies of all documents reflecting respondent's prior disciplinary record. Although the court has independently obtained copies of respondent's prior disciplinary record and will consider those records in making its decision in this proceeding, the court will insist, in the future, that the State Bar fully meets its evidentiary obligations.

Accordingly, the court judicially notices respondent's prior disciplinary record as follows: *Brockway v. State Bar* (1991) 53 Cal.3d 51, pursuant to Evidence Code section 451, subdivision (a); and *In the Matter of Brockway, supra*, 4 Cal. State Bar Ct. Rptr. 944, pursuant to Evidence Code section 452, subdivision (d)(1).

⁸Wilfulness in the context of rule 955 does not require actual knowledge of the provision which is violated. The Supreme Court has disbarred an attorney whose failure to keep his official address current prevented him from learning that he had been ordered to comply with rule 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

Respondent's prior discipline record is an aggravating circumstance. (Std. 1.2(b)(i).) As previously discussed, in S144707, the Supreme Court imposed discipline consisting of five years' stayed suspension and five years' probation on conditions including actual suspension for two years and until he complied with standard 1.4(c)(ii), among other things. In that matter, respondent was found culpable of 14 acts of misconduct (essentially, abandonment) regarding four clients. There were no mitigating circumstances. In aggravation, the court found one prior instance of discipline, multiple acts of misconduct, significant client harm, indifference to the consequences of misconduct and moral turpitude.

In *Brockway v. State Bar*⁹, the Supreme Court imposed discipline consisting of one year's stayed suspension and two years' probation on conditions including three months of actual suspension for misappropriating \$500 from one client and acquiring an adverse interest against another. Aggravating factors included lack of candor and indifference. Mitigating factors included no prior discipline; good character evidence; and application of former rule 5-101 of the rules of Professional Conduct to novel facts.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by not complying with rule 955(c) even after the NDC in the instant proceeding was filed. (Std.1.2(b)(v).)

Respondent's failure to participate in proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 109-110.)

V. FINDINGS AND CONCLUSIONS AS TO MITIGATING CIRCUMSTANCES

Respondent did not participate in these proceedings or present any mitigating circumstances pursuant to standard 1.2(e). Since respondent bears the burden of establishing

⁹Supreme Court order no. SO12628 (State Bar Court case no. 83-O-10764 , effective May 15, 1991.

mitigation by clear and convincing evidence, the court has no basis for finding mitigating factors.

VI. LEVEL OF DISCIPLINE

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Respondent's wilful failure to comply with rule 955(c) is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116,131; rule 9.20(d) (formerly rule 955(d).) Disbarment has been consistently imposed by the Supreme Court as the sanction for noncompliance with rule 955. (*Bercovich v. State Bar, supra*, 50 Cal.3d at p. 131; *Lydon v. State Bar, supra*, 45 Cal.3d at p. 1188; *Powers v. State Bar, supra*, 44 Cal.3d at p. 342.)

Respondent has demonstrated an unwillingness to comply with the professional obligations and rules of court imposed on California attorneys although he has been given the opportunity to do so. He did not participate in this proceeding and did not comply with rule 955(c). More importantly, respondent's noncompliance with rule 955 undermines its prophylactic function in ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar, supra*, 45 Cal.3d at p. 1187.)

Respondent's disbarment is necessary to protect the public, the courts and the legal community, to maintain high professional standards and to preserve public confidence in the legal profession. It would undermine the integrity of the disciplinary system and damage public confidence in the legal profession if respondent were not disbarred for his unexplained wilful disobedience of the Supreme Court 's order.

VII. DISCIPLINE RECOMMENDATION

It is hereby recommended that respondent David Eric Brockway be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule

9.20(a) of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in rule 9.20(c) within 40 days of the effective date of the order showing his compliance with said order.

VIII. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

IX. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: July ___, 2007

RICHARD A. HONN
Judge of the State Bar Court